STATE OF MICHIGAN

COURT OF APPEALS

LYNN CARLA ZEVALLOS,

Plaintiff-Appellant,

v

NICO KARL GATZAROS,

Defendant-Appellee.

UNPUBLISHED
September 2, 2003

No. 245659
Wayne Circuit Court
LC No. 93-363575-DP

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

In this child custody dispute, plaintiff appeals as of right from a final order of custody. We vacate the order and remand.

This case involves an ongoing struggle between plaintiff and defendant over their son, who is presently eleven years old. For at least the first six years of the child's life, plaintiff had sole custody of the child and defendant had little contact with the child. In January 2001, defendant was awarded parenting time with the child. In January 2002, defendant filed an emergency motion for change of legal and physical custody. On January 23, 2002, by stipulation of the parties, the trial court ordered that an evidentiary hearing be held, independent psychological examinations on plaintiff, defendant, and the child be conducted, and also ordered a temporary change of custody. Regarding custody, the court awarded plaintiff and defendant joint legal custody of the child and awarded defendant and the child's paternal grandparents temporary joint physical custody, with the child living with the grandparents.

Thereafter, it appears that the psychological tests were performed, and according to the record, on the day set for the evidentiary hearing, the parties' attorneys met with the friend of the court referee in an off-record proceeding. While there is no record of this meeting, defendant represents that, at the meeting, there was a conference call between the referee, the attorneys, and the psychologist, which ended with the understanding that plaintiff would do "a laundry list of things" that the psychologist suggested. On November 21, 2002, defendant filed a motion for final order of custody and change of schools, and on December 3, 2002, the friend of the court referee held a hearing on that motion.

At the hearing before the referee, defendant argued that plaintiff waived her right to an evidentiary hearing by choosing not to conduct the scheduled evidentiary hearing, and further argued that plaintiff failed to comply with any of the psychologist's recommendations. Plaintiff

in turn argued that she did not waive her right to an evidentiary hearing, and again requested the hearing. The referee determined that based on the psychologists' reports, including the child's psychologist's report, "there is still a dangerous situation" in plaintiff's home and that plaintiff had made little effort to correct the situation.[1] The referee further held that under MCR 3.210(C)(7), no evidentiary hearing was necessary because there was no evidence that would convince him that the grandparents should not get permanent custody. On that same day, the trial court reviewed the referee's decision. Defendant again reiterated her request for an evidentiary hearing. The trial court, however, entered a final order of custody granting joint legal custody of the child to plaintiff, defendant, and the grandparents, and physical custody of the child to the grandparents.

Plaintiff now argues that the trial court erred in entering the final order of custody without holding a de novo hearing pursuant to MCL 552.507(5). We agree.

"To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. A trial court's findings are against the great weight of the evidence if the evidence clearly preponderates in the opposite direction. *Mogel v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Fletcher v Fletcher*, 447 Mich 871, 879,880; 526 NW2d 889 (1994).

MCL 552.507(5), provides, in relevant part:

> (5) The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party under subsection . . . .

Thus, if either party objects to the referee's report or recommendation, the trial court must hold a de novo hearing. *Harvey v Harvey*, ___ Mich App ___ ; ___ NW2d ___ (Docket No 244950, issued June 24, 2003), citing MCR 3.215(E)(3)(b); *Cochrane v Brown*, 234 Mich App 129, 133-134; 592 NW2d 123 (1999).[2] This hearing must be a hearing de novo, not merely a de novo review. *Cochrane*, *supra* at 132, citing *Mann v Mann*, 190 Mich App 526, 529; 476 NW2d 439

[1] Some of the allegations against plaintiff were that she was sporadically employed, she failed to maintain her house, she was arrested and convicted of assault, and she overdosed on Xanax. It was also alleged that plaintiff allowed the child to ride two miles to school alone on his bike, plaintiff forced the child to care for his younger siblings, and plaintiff physically abused the child. Finally, it was alleged that plaintiff had psychological problems and failed to get mandatory psychotherapy.

[2] MCR 3.215(E)(3)(b), sets forth the requirements for a party to obtain a judicial hearing on any matter that has been the subject of a referee hearing.

(1991). This means that the trial court is required to conduct a hearing as if no friend of the court hearing had been conducted previously, and the court must arrive at an independent conclusion. *Marshall v Beal*, 158 Mich App 582, 591; 405 NW2d 101 (1986).[3]

At the hearing before the trial court, after both parties made their objections, the court stated the following:

> The point I am making here, this is a very important matter to the Friend of the Court. These matters are not taken lightly when this is done. The reasons why this matter was brought before the Court is that the referee, after hearing the evidence, made certain recommendations.
>
> After reading what was submitted to this Court, and based on that recommendation, and the fact that this Court agrees that there are too many people involved in the joint physical custody of the child. It causes complications, leads to unnecessary litigation, I'm going to grant the motion to limit the joint and physical custody to the father and the grand[parents].

Under the circumstances, and in light of the trial court's minimal analysis, we find that the trial court failed to conduct a proper de novo hearing. The statutorily authorized report and recommendation of the referee are not admissible as evidence at a custody hearing unless both parties agree to admit the evidence. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). However, the report may be used as an aid to understanding the issues to be resolved. *Id*.; *Harvey*, *supra*. Here, plaintiff objected to the referee's recommendation and sought a de novo hearing before the trial court. However, at the hearing, the trial court expressly stated that it based its decision on the referee's recommendation. At most, the trial court conducted a de novo review, and not a de novo hearing. MCL 552.507(5) expressly provides for a de novo hearing, and, under MCL 552.507(5), plaintiff is entitled to "a hearing as if no friend of the court hearing had been conducted previously and [the circuit court must] arrive at an independent

[3] We note that while MCL 552.507(5) requires a hearing only on a written request by a party or on the trial court's own motion, it is unclear from the lower court record in this case whether either party filed an actual written request for a de novo hearing. It is clear from the transcripts that plaintiff continuously requested an evidentiary hearing throughout the proceedings; however, we have been unable to verify by the record that, after the referee's recommendation, plaintiff filed a written request for a de novo hearing. Nonetheless, the record is clear that on the same day the friend of the court referee held a hearing and made his recommendation, the parties went before the trial court stating their objections to the referee's recommendation. Defendant acknowledged in his brief on appeal that plaintiff sought review of the referee's findings, but rather than argue the merits of a hearing pursuant to MCL 552.507(5), defendant argues that plaintiff was not entitled to an evidentiary hearing pursuant to MCR 3.210(C)(7). Plaintiff raised this issue regarding MCL 552.507(5) in her brief on appeal and defendant could have and should have responded to that argument. Because there has been no argument made that the requirements for requesting a de novo hearing were not met, we refuse to raise the issue on our own.

conclusion." *Marshall, supra* at 591. Accordingly, we find that the trial court's failure to conduct a hearing de novo in this case was clear error requiring vacation of the court's order.

We note that defendant primarily argues on appeal that the trial court properly refused to conduct an evidentiary hearing because under MCR 3.210(C)(7), an evidentiary hearing was not required because there was no "contested factual issue to resolve in order to make an informed decision." MCR 3.210(C)(7), provides:

> (7) In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

The trial court, however, did not determine that an evidentiary hearing was not necessary under MCR 3.210(C)(7). Rather, the trial court conducted a hearing, but improperly relied on the referee's recommendation in arriving at its decision. Further, the trial court did not state or imply that it relied on MCR 3.210(C)(7) to dispose of the matter. Therefore, because there is no indication that the trial court relied on MCR 3.210(C)(7) in arriving at its decision, defendant's argument is misplaced.

We vacate the order of the trial court and remand this case for a hearing de novo. In light of our disposition of this issue, we need not address plaintiff's remaining issue on appeal concerning whether the trial court failed to make findings of fact relative to the best interests of the child. On remand, after a de novo hearing, the trial court must state its independent conclusions, including its findings with regard to the best interests of the child. We do note, however, that on appeal, plaintiff also asserts that the trial court and the referee should be disqualified from the case because they have previously reached prejudicial conclusions without having heard any testimony. Plaintiff may not merely announce her position and leave it to this Court to discover and rationalize a basis for her claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Here, plaintiff "present[s] a one-sentence [request for relief] with no citation or authority." *Id*. Accordingly, this issue has not been properly presented, and we will not address it.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage